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Supreme Court, U.S.
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No. 88-8801

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROWLAND LAMAR ALLEN, ET AL
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

HYLTON B. DUPREE, JR.
(Counsel of Record)
MARK A. JOHNSON
A. GREGORY POOLE
P.O. Box 525
Marietta, GA 30061
(404) 242-7171

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QUESTIONS PRESENTED FOR REVIEW

May Petitioners seek the vacating of forfeiture default judgments pursuant to FRCP Rule 60(b) premised upon the subsequently-decided authority in *U.S. v. $38,000 in U.S. Currency*, 816 F.2d 1538 (llth Cir., 1987), or are they so precluded by the doctrine of res adjudicata?

Does the government's failure to serve forfeiture warrants (with attendant notice requirements as to claim filing requisites) offend due process and void forfeiture actions ab initio, so that resulting default judgments are nullities?

Is the government "subjected to injustice and hardship" by permitting Petitioners a hearing on the merits, or is forfeiture favored so that appropriate remedies could not be fashioned to address the government's forfeiture windfall?

CERTIFICATE OF INTERESTED PERSONS

United States of America, Rowland Lamar Allen, Mid-Town Contractors, Inc. and Property Pick-Up, Inc., and certain real estate property located at: 764 Rochelle Drive; 1546 Alda Lane; 148 Atlanta Avenue; 1952 Willa Way; 2929 Landrum Drive, S.W.; 4370 Valley Brooke Drive; 1542 Pineview Terrace, S.W.; 2244 Brannon Road; 2306 N. Eiffel Court; 2264 Collier Drive; 3299 Rabun Drive; 2424 Dawn Drive; 3357 Columbia Trace; 1194 Greenleaf Road; 1382 Oak Street; 948 Byron Drive; 3171 Topaz Lane; 2240 Squire Court; 2820 Valley Ridge Drive; 5864 Deerfield Trail; 2225 Swallow Circle; Business and properties of Midtown, et al. 1061, 1097, 1081, 1088, 1073, 1089 Neal Place; 2971 Landrum Drive; One (1) 1979 Cadillac Eldorado, One (1) 1983 Mazda, One (1) 1979 Mercedes Benz.

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JURISDICTIONAL GROUNDS

Jurisdiction inheres in this Court, as Petitioners appeal the Dismissal of their Complaint, filed pursuant to FRCP 60, to contest the summary forfeiture of their properties under 21 U.S.C. 881 (a) (6) to the United States.

Order of Dismissal was entered in the United States District Court on August 17, 1988, and Petition For Rehearing En Banc was denied and entered by the Eleventh Circuit Court of Appeals on August 25, 1989.

The Dismissal of the Complaint constitutes a final, appealable judgment under 28 U.S.C. §1291.

PERTINENT STATUTES

21 U.S.C.A. 881. Forfeitures.

Property Subject (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . .

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this praragraph to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims, (b) Any property subject to forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property . . .

F.R.C.P. Rule 55. Default.

(b) Judgment. Judgment by default may be entered as follows:
(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) By the Court. In all other cases, the party entitled to a judgment by default shall apply to the court therefore; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

F.R.C.P. Rule 60. Relief from Judgment or order.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for the reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of relief are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS RULE C. Actions in Rem:

Special Provisions

(1) When available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be

during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Process. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

(4) Notice. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E (5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper or general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, SSD 30, as amended.

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn af-

firmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possesion by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

RULE E. Actions in Rem and Quasi in Rem: General Provisions

(1) Applicability. Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) Complaint; Security.

(a) Complaint. In actions to which this rule is applicable, the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

Statement of the Case

This Petition is from the order and judgment of The United States District Court, Northern District of Georgia, Atlanta Division entered August 17, 1988, by Judge Robert H. Hall, which effectively granted Defendant United States of America's Motion to Dismiss Plaintiffs' Complaint and "terminate(d) this action." This Order has been affirmed without opinion by the 11th Circuit Court of Appeals.

Under the auspices of Rule 60(b) Fed.R.Civ.P., Petitioners sought to vacate numerous judgments of default entered by the same court in forfeiture actions brought against the Petitioner properties in 1984.

The Order of Complaint Dismissal and action termination essentially held that the previous default ruling should be given res judicata effect, relying upon the concept that void judgments are narrowly construed, *Rubins v. Johns*, 109 F.R.D. 174, 178 D.V.A. (1986); Civil judgments should not be collaterally attacked on the basis of sebsequent judicial pronouncements, *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981); that the interests of Petitioners do not rely upon judicial decisions which involve momentous changes in important, fundamental constitutional rights, *Precision Air Parts, Inc. v. Aveco Corp.*, 736 F.2d 1499, 1503 (llth Cir. 1984); and that a hearing on the merits in this case would "work an injustice and a hardship" on parties who may have acquired vested rights under the judgments. *Douglas-Guardian Warehouse Corp. v. Posey*, 486 F.2d 739, 742-743 (l0th Cir. 1973).

Statement of Facts

On or about March 8, 1984, agents of the Drug Enforcement Administration (DEA), seized the Petitioner properties, relying upon the affidavits of DEA Agent Melvin Smith. They recited that Petitioner properties constituted profits and/or fruits of a

continuing criminal enterprise; and that Petitioner properties were subject to civil forfeiture pursuant to 21 U.S.C. 881 (a) (6). The affidavits were devoid of facts.

Once the Petitioner properties were seized in accordance with the arrest warrants, the Government filed Complaints for Forfeiture on or about March 9, 1984, against Petitioner properties. Each complaint was skeletal in form and simply stated that there was probable cause to believe Petitioner properties represented proceeds traceable to an exchange for a controlled substance and, thereby was subject to forfeiture under 21 U.S.C. 881. The complaints were bereft of specific allegations that could connect the Petitioner properties to the continuing criminal enterprise referenced in Melvin Smith's affidavits at paragraph 6.

After the filing of the Complaints for Forfeiture, summons were issued on each piece of Petitioner property. These summons were directed to the claimants of the Petitioner property and informed them that they had twenty (20) days to answer the complaint for forfeiture. Nowhere in the summons did it inform the claimants that, according to Rule C of the Supplemental Admiralty and Maritime Claims Act, they must file claims to the Petitioner properties within ten (10) days from service of the warrant. While the ten-day claim requirement was denoted to the United States Marshall in seizure warrants, it nowhere appeared in any document served on Petitioner.

Additionally, the Seizure Warrant erroneously declared that a claim must be filed within ten days of service of the *Complaint* rather than service of the *Warrant*. The Warrants of Arrest of property, containing reference to the 10-day claim period from service of the Arrest Warrants, were never served on any natural Petitioner.

Petitioners submit this lack of notice proximately caused Petitioner, Rowland Allen, to be justifiably "dilatory" in filing

the necessary claim to the Petitioner properties, although the 10-day period has actually not begun to run to this day. Rowland Allen did not file a claim to the Petitioner properties within the "required" ten (10) days as determined by Judge Hall, but he attempted to mitigate his predicament by filing a claim at a later date.

Rowland Allen was subsequently acquitted of the continuing criminal enterprise charge that constituted the basis of Special Agent Melvin Smith's Affidavit for Seizure Warrant.

After Rowland Allen filed his initial claim, the Government argued that his claim was not filed on time and, therefore, should preclude him from defending the case on its merits. The Court agreed with this position and issued an Order that prevented Rowland Allen's from defending the forfeiture action.

While Petitioners sought reconsideration, default judgments were entered in all cases on November 27, 1984.

The Petitioner properties were subsequently sold by the Government at an auction and the Government retained the proceeds from these sales. Following the decision in *U.S. v. $38,000 in U.S. Currency*, 816 F. 2d 1538, (11th Cir., 1987), Petitioners brought the underlying Complaint and Amendment to the Complaint, reasoning that the ubiquitous defects in the seizure process and Complaints for Forfeiture rendered the default judgments null and void from their inception, as there was never the requisite service of process to establish jurisdiction.

Argument

While property forfeiture is a tool of considerable utility in society's "war" against drugs, its use should be tempered with some hommage to fundamental constitutional precepts. Notions such as "due process" and "rights against unreasonable

seizure" should not be hollow musings or antiquated verbiage winked at cynically, but should be honored more in the observance than in the breach.

Petitioners have been deprived of properties through the expedient of default judgments, when it is readily apparent that petitioners were never served with arrest warrants, were never apprised of ten (10) day claim periods, and that these gargantuan inadequacies directly inhere from numerous mistakes committed by the U.S. Attorney and the Clerk of Court. These assertions are not in dispute. Petitioners only seek a hearing on the merits — a decidedly modest proposal, somewhere echoed in the annals of American Law. Yet the ultimate irony is that the predicate offense underlying the property seizure (a claim of continuing criminal enterprise), has been dismissed. Hence, this meritorious defense underscores that there has been more than "harmless error."

Forfeiture law is presently a hopeless melange of conflicting interpretations of Admiralty and Maritime Procedure quixotically applied to high and dry property. Judge Kravitch has decried this "procedural morass" which spawns considerable entropy and confusion, thereby resulting in confiscation of property through default rather than meritorious application. Forfeiture, as a tool, should be skillfully wielded rather than used as a bludgeon.

This Court must clarify the pastiche which currently passes for forfeiture law, and lend viability and protection to the precepts of property rights.

From the inception of American Constitutional Law, forfeitures have been abhored until Rowland Allen and his various properties were snared in the 21 U.S.C. section 881 dragnet. The previous entreaties of Rowland Allen fell upon deaf ears. Not until the Eleventh circuit addressed the pervasive inadequacies utilized under 21 U.S.C. section 881 in *U.S. v. $38,000.00*

in U.S. Currency, 816 F.2d 1538 (llth Cir. 1987), was a Court willing to admit the manifold travesties of application witnessed in recent government forfeiture actions. The parallels of *$38,000.00* to the case of sub judice are salient, including almost identical pro forma "affidavits," and identical government offices with the same "canned" pleadings, which contain the same errors. Furthermore, Rowland Allen was never served with the property warrants demanded under 21 U.S.C. section 881; accordingly, he was never informed of the l0-day claim period, making default so much the easier to engineer.

Rowland Allen and the named properties were never afforded a hearing on the merits of the government's forfeiture claims, and all attempts at judicial relief failed. Following the Eleventh Court's decision in *$38,000.00*, Petitioners filed a Complaint under the auspices of Rule 60(b) of the Federal Rules of Civil Procedure, claiming that the same defects decried in *$38,000.00* attain due process magnitude and demanded their vacating as having been void ab initio.

The default mechanism utilized by the Government was a ten-day claim period denoted in arrest *Warrants* never served on Petitioners. The Court misconstrued service of a *Complaint* delineating a 20-day response period as apparently triggering the ten-day claim period. Even those unschooled in law or the Constitution perceive the fundamental unfairness of serving a complaint summons, containing a twenty-day answer reference, and then eviscerating Petitioners because they did not file a claim (not an answer) within ten days. The summons makes absolutely no reference to the claims requirement, nor to the Supplemental Rules for Certain Admiralty and Maritime Claims under which the claims must be submitted. Query: How is anyone in such a situtation reasonably expected to be able to comply with undisclosed time and claim requirements? As Judge Kravitch has noted in *U.S. v. $38,000.00 in U.S. Currency*, 816 F.2d 1538 (llth Cir. 1987), "the application of these 'supplemental admiralty and maritime claims' rules to Section

881 forfeitures has created a procedural morass — a morass in which the parties to the instant action become hopelessly entangled." Ibid, page 1540.

On facts with obvious parallels to the instant case, Judge Kravitch in *$38,000.00* ruled that as the government never properly executed process, the property owners there were not obligated to file within the ordinary time constraints. The Court determined that the warrant for the arrest of the property must be served by the United States Marshall and that notice of the seizure "together with information on the applicable procedures to each party who appears to have an interest in the seized article" must also be directed to the appropriate individuals. 19 USC Sec 1607: 19 CFR Sec 162.31. Judge Kravitch ruled that process is executed once, but not until, the warrant for the arrest of the property is served in accordance with Supplemental Rule C(3). Until then, no ten-day claim requirement manifests under Supplemental Rule C(6). As in the instant cases, the warrant there was itself deficient as it demanded filing of a claim within ten days of the service of the *Complaint*, rather than from service of the *warrant*. Again, warrants and summons were never even served in the instant case. The Court in *$38,000.00* furthermore scrutinized the complaint for forfeiture and deemed it to be so devoid of facts as to mandate dismissal of the government's complaint. In the instant case, the only fact enumerated that in March of 1984, agents of the Drug Enforcement Administration seized each of the Petitioner properties.

The Court in *$38, 000.00* specifically referred to Supplemental Rule E(2) which establishes the standards of factual particularity for forfeiture complaints filed pursuant to Supplemental Rule C. A forfeiture complaint must "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." There are no exceptions to this requirement, and the Court ruled there that the complaint

was completely bereft of factual support for the government's allegation that it had probable cause for forfeiture under Sec. 881. Held the Court:

> "We agree and hold that a Section 881 (a) forfeiture complaint must allege sufficient facts to provide a reasonable belief that the property is subject to forfeiture: in particular, that the government has probable cause to believe that a substantial connection exists between the property to be forfeited and the exchange of a controlled substance." *$38,000.00*, page 1548.

The Court's ruling in *$38,000.00* is consistent with rulings in *United States v. $39,000.00 in Canadian Currency*, 801 F.2d 1210, 1216-19 (l0th Cir. 1986); *United States v. $4,255,000.00*, 762 F. 2d 895, 903 (11th Cir. 1985); *U.S. v. Pole No. 3172, Hopkinton*, 852 F. 2d 636 (lst Cir. 1988); *United States v. U.S. Currency in the amount of $103,387.27*, 863 F.2d 555 (7th Cir. 1988); *United States v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432 (9th Cir., 1985); *U.S. v. One Assortment of 89 Firearms and 638 Rounds of Ammunition*, 846 F. 2nd 24 (6th Cir. 1988); *U.S. v. Beechcraft Airplane, Serial #LD-24*, 789 F. 2nd 627 (8th Cir. 1986); and *Precision Air Products, Inv. v. Aveco Corp.*, 736 F. 2nd 1499, 1503 (11th Cir. 1984). However, these cases are inconsistant with the ruling set forth in the instant case.

While this Supreme Court requires that meticulous attention be paid to detail, it also requires that the proper procedural rules of due process be liberally applied. In the instant context, Rule C(6) requires a claimant to file his claim within ten days after service of process of the arrest warrant on the property, or within such additional time as may be allowed by the Court. It is the responsibility of the district courts to assure that service is proper prior to entertaining default. It is thus within the district court's discretion to permit or correct any procedural errors in the case or permit an extension of time to file a claim.

See *United States v. 1982 Yukon Delta Houseboat,* 774 F.2d 1432 (9th Cir. 1985); *United States v. One (1) Mercedes 450 SE,* 651 F. Supp. 351 (S.D. Fla. 1988).

The question presented is whether the district court abused its discretion in entering default without assuring that default had in fact occurred. As there was no service, no default entry was proper. An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered or when the court fails to analyze the applicable factors. *United States v. Strawser,* 800 F.2d. 704,709 (7th Cir. 1986) denied sub nom. *Anderson v. United States,* 480 U.S. 906 107 S.Ct. 1350, 94 L.Ed. 2d 521 (1987): In re. *American Reserve Corp.*, 841 F.2d 159, 162 (7th Cir. 1987) (abuse of discretion standard implies that the judge must actually exercise his discretion): *United States v. Kramer,* 827 F.2d 1174, 1179 (8th Cir. 1987). See also *United States v. $149,345 in U.S. Currency,* 747 F.2d 1278, 1282 (9th Cir. 1984).

There is no evidence in the instant case that the court considered relevant factors when exercising its discretion in entering default. This is apparent, as the respective files do not reflect the service mandated under Rule C(6) and under fundamental constitutional precepts of notice, and in further ascribing "bad faith manipulation" to petitioners, when the government does not now dispute the underlying facts. See *United States v. Properties described in Complaints: 764 Rochelle Drive,* 612 F. Supp. 465, 467 N3 N.D. Ga. 1984 Aff.d 79 F.2d 58 (11th Cir. 1985), which is the instant case. Under the abuse of discretion standard, the proper inquiry is not how the reviewing court would have ruled if it had been considering the case: rather, whether any reasonable person could agree with the district court. *Deitchman v. E.R. Squibb & Sons Inc.,* 740 F.2d 556, 563 (7th Cir. 1984).

In the case of *U.S. v. $38,000.00 in U.S. Currency,* 816 F. 2d 1538 (11th Cir. 1987), the Court reversed Judge Hall's orders

and dismissed the government's complaint without prejudice in order that the matter could be rebrought and adjudicated on its merits. Held the Court:

> "We are not unsympathetic to the government's strong desire to eradicate drug trafficking: we recognize that illegal drugs pose a tremendous threat to the integrity of our system of government. We must not forget, however, that at the core of this system lies the Constitution, with its guarantes of individual's rights. We cannot permit these rights to become fatalities of the government's war on drugs." Ibid, Page 1549.

In the instant case, Petitioners seek only an opportunity to have this matter resolved on its merits. The Order dismissing Petitioners' complaints (and the termination of their respective actions) fails to address the viability of Federal Rule of Civil Procedure 60 as to the relief it affords from judgments or orders.

> Rule 60(b) holds "on motion and upon such terms as are just, the Court may relieve a party or a parties' legal representative from a final judgment, order, or proceeding for the following reasons: . . .(4) the judgment is void; . . .or (6) any other reason justifying relief from the operation of the judgment."

Rather, the entered order elides in its reliance upon lines of cases which essentially trumpet the finality of judgments. See *Precision Air Parts, Inc. v. Aveco Corp.*, 736 F.2d 1499, 1503, (llth Cir. 1984), cert. denied, 469 U.S. 1191 (1985); *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981); *Douglas-Guardian Warehouse Corp. v. Posey*, 486 F.2d 739 (10 Cir. 1973).

Professor Moore clearly states that the District Court has power to grant Petitioners relief from void judgments, and

Petitioners claim these forfeiture actions were void ab initio.

> "[a] void judgment . . . may be collaterally attacked, i.e., its nullity and ineffectiveness asserted at any time, in any proceeding where the validity of the judgment comes in issue and is appropriately challenged. The principle underlying collateral attack is that since the judgment is void, the attacking party need show no 'equities' or 'merit' in his favor; these are irrelevant for the court now adjudges the judgment to be void, it is merely recognizing and declaring that which already existed. 7 Moore's Fed. Practice Sec. 60.41 [1].
>
> Since the void judgment establishes no binding legal obligations, it should not have any *res judicata* effect when its validity comes in question in any Federal Court.
>
> * * *
>
> We conclude, therefore, that Rule 60(b) is dealing with direct attacks upon judgments rendered by a Federal District Court in a civil action; and that it leaves undisturbed the right to make a collateral attack upon the federal judgment in any proceeding wherein the validity of the judgment is appropriately challenged. Laches of a party will not infuse life into a void judgment. The judgment is a legal nullity and may be collaterally attacked at any time." 7 Moore's Fed. Practice Sec. 60.41[2].

Although Rule 60(b) seems to afford a basis for relief by motion, the courts have consistently held that Petitioners have the right to bring an independent action for Rule 60(b) relief as in the case at bar. (See 7 Moore's Fed. Practice Sec. 60.36 et sec). F.R.C.P. 55(c) permits the court to set aside default "for good cause shown" pursuant to Rule 60(b).

Courts have specifically ruled that forfeiture procedural infirmities invalidate the entire forfeiture process from its incep-

tion:

"The Court views with displeasure the Attorney General's ability to seize real property based on a pro forma complaint and admiralty warrant that does not recite even basic facts which would enable a dispassionate observer to objectively conclude that the property may be subject to forfeiture. This is a defect of constitutional proportions which invalidates the seizure process ab initio." *United States v. Certain Real Property*, 612 F. Supp. 1492, 1495 (D.C. FLA. 1985).

In *U.S. v. U.S. Currency Totaling $3,817.49*, 862 F.2d 785 (8th Cir.), the property owners failed to timely file an answer within twenty days of the filing of a claim in a property forfeiture action, which contravened Supplemental Rule for Certain Admiralty and Maritime Claims C(6). Default judgment was entered against the claimants, to which the 8th Circuit applied the ratio decidendi of *$38,000*. In *$3,817.49*, the claimants filed an unverified claim, at least putting the government on notice that they intended to claim the property. Held the Court in distinguishing *U.S. v. Beechcraft Airplane, Serial #LD-24*, 789 F.2d 627 (8th Cir. 1986):

"Nor do we believe *Beechcraft* controls whether the Gulleys' (claimants) failure to file their answer within twenty days of the filing of their claim requires entry of a default judgment as *Beechcraft* did not address that issue . . .Accordingly, we affirm the District Court's default judgment without prejudice to the claimants' filing of a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the default judgment for mistake, inadvertance, surprise or excusable neglect." *$3,817.49*, supra, page 788.

Hence, it is apparent that sister circuits envision this

precise mechanism utilized by Petitioners shall afford the relief which Petitioners seek, and res judicata is not a bar to the institution of a Rule 60 motion/complaint.

In *United States v. One Assortment of 89 Firearms and 638 Rounds of Ammunition*, 846 F.2d 24 (6th Cir. 1988), the Appellate Court excused an early filing of a verified claim where the warrant of seizure and monition was executed by the Marshall on August 6, 1986, after having been issued on May 27. The Sixth Circuit, relying upon *$38,000*, supra, excused claimant's procedural oversight by noting "however, courts have excused claimants' noncompliance with the rules, when the noncompliance was the result of their reliance on actions by the government . . . Since the time for filing a verified claim did not begin to run until the execution of the warrant of seizure, and since the early filing of Daniel's claim was justified by the actions of the government, Daniel's answer should not have been struck and he should have been allowed to proceed to the merits of his case." *One Assortment of 89-Firearms*, supra, page 27.

This case is of particular significance, as it clarifies that Petitoners, even at this stage, are not required to file verified claims as the clear face of the record indicates that the Marshall has not yet executed process on Petitioners. As there has been no service, no one is in default.

The Order in the instant case justified its entry of default judgments by noting "in the interest of finality, the concept of void judgments is narrowly construed." *Rubin v. Johns*, 109 F.R.D. 174, 178 (D.V.I. 1986). To this, Petitioners respond that as a black-letter tenet, forfeitures are not favored in the law, and strict compliance with the letter of the law by those seeking forfeiture must be required. *United States v. One 1936 Model Ford V-8 Deluxe Coach*, 307 US 219, 226, 59 S. Ct. 861, 865, 83 L. Ed. 1249 (1939).

As Professor Moore has noted, judgments disposing of a case

without consideration of the merits (i.e. default judgments) must be considered against a background of general preference for disposition of cases on their substantive merits. *7 Moore's Fed. Practice*, Sec.60.19.

The Order of Dismissal brandishes several cases for the proposition that final judgments are to be afforded great deference. See *Precision Air Parts*, supra, *Douglas-Guardian Warehouse Corp.*, supra, and *Hardison v. Alexander*, supra. Petitoners distinquish this line of cases by again noting that the earlier proceedings were void ab initio as the warrant summons were never served upon Petitioners and the ten day claim period has not, even at this late date, begun to run. No service of process, no jurisdiction.

Finality of judgments, while desirable certainly as a general proposition, should not be exalted on some altar where Petitioners' property rights represent burnt offerings. Res judicata is not a dispositive doctrine in the present case, due to the procedural deficiencies soley initiated and propagated by the government.

> "In those cases which seek to impound property alleged to be related to illegal drug traffic, the government seized claimant's properties after obtaining warrants pursuant to the Supplemental Maritime Rules. The complaints upon which the Attorney General obtained these warrants did not recite even basic facts which would enable a dispassionate observer to conclude objectively that the property may be subject to forfeiture. This is a defect of Constitutional proportions which invalidates the seizure process *ab initio*." *United States v. Life Insurance Co. of Virginia*, 647 F. Supp. 732, 739 (W.D.N.C. 1986).

Where actions are void from their inception, where jurisdiction is not established, and where defaults are erroneously

entered, there is no compelling interest whatsoever in "finality."

The Trial Court eschews the application of the case of *United States v. $38,000.00 in United States Currency*, 816 F.2d 1538 (llth Cir. 1987) to the case sub judice, noting that the decision in *$38,000.00* was entered on May 18, 1987, while the entry of Default in the present case occurred on November 27, 1984. Petitoners disagree, noting this Court's pronouncements do not proscribe retroactive or retrospective application of case authority.

Perhaps the seminal case establishing the parameters on retrospective application of civil decisions is to be found at *Hanover Shoe v. United Shoe Machinery Corp.*, 392 US 481, 20 L. Ed 2d 1231, 88 S.Ct. 2224 (1968). There, this Court grappled with the issue of treble damages in an antitrust action concerning monopolization of the shoe machinery market. At issue was a subsequently decided case, *American Tobacco Co. v. United States*, 328 US 7681 90 L. Ed. 1575, 66 S. Ct. 1125, and whether its ruling had retrospective applicability to damage determination in *Hanover Shoe*.

This Court held in *Hanover Shoe* that retrospective application of the *American Tobacco* decision was warranted. This Court in *Hanover Shoe* espoused that, to hold otherwise, there must have been a clearly declared judicial doctrine which was later overruled in favor of a new rule; if conduct performed in reliance upon the old rule would have hence been unlawful, then retrospective application of the decision would be proscribed.

This Court in *Hanover Shoe* held that the opinion in *American Tobacco* was neither novel, nor that innovative principles were necessary to resolve the issues there present. American Tobacco did not adopt a "radically new interpretation of the Sherman Act," nor did it represent "an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which

in effect replaced an older one. Whatever development in antitrust law was brought about was based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years." *Hanover Shoe*, 392 US 498, 499, 20L Ed 2d 1244.

As may be discerned from an even cursory analysis of *United States v. $38,000.00 in United States Currency*, supra, nothing "new or novel" underpins the decision. Judge Kravitch notes that the Supplemental Rules for Certain Admiralty and Maritime Claims (21 USC Sec 881 (d), Supplemental Rule A) were "borrowed" (21 USC Sec 881) for forfeiture actions, as no procedural rules had been specifically designed or developed to apply to forfeiture actions. The opinion in *$38,000.00* merely applies a reasonably forseeable remedy for clear transgressions under the referenced statutes.

The Eleventh Circuit in *$38,000.00* concludes that the property owner need not file a claim pursuant to Supplemental Rule C(6) where the government does not viably execute process. The face of the record in the instant forfeiture actions demonstrate the warrant summonses were never served. Supplemental Rule C(6) requires a claimant to property to "file his claim within 10 days after process has been executed". Rule A of the Supplemental Rules incorporates the rules of civil procedure to the extent they are not inconsistent. Civil Procedure Rule 4(b) requires process to contain a summons which states "the time within which these rules require the Defendant to appear and defend, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him for the relief demanded in the complaint."

It requires no keen insight to realize the same government office, these same boilerplate forms with the same errors, the same judge and the same time frame are involved in *$38,000.00* and the instant case.

As a result, Judge Kravitch reversed the Orders of the District Court as to their disposition of the claims in favor of the government and remanded the case to the District Court for dismissal of the government's complaint. Judge Kravitch ruled the dismissal to be without prejudice in order that the government reinitiate its action for adjudication on the merits of the cases.

Even a desultory review of the *$38,000.00* case reveals that it is clearly a civil case which should be given retrospective application. *$38,000.00* is hardly promethean, in that it merely applies the letter of the law pre-existing both under 21 USCA § 881 and the Supplemental Admiralty and Maritime Claims Rules. No "radically new interpretation" of these rules underpins *$38,000.00,* nor was there "an abrupt and fundamental shift in doctrine." Judge Kravitch merely applied the letter and tenor of the rules.

The Order of Dismissal evinces the concern of the government in the event that Rowland Allen and the other Petitioners are given their day in court to address the merits of the government's confiscation of the Petitioner properties. "If this Court were to vacate the forfeiture judgments at this juncture, the innocent third-party purchasers would be subjected to injustice and hardship."

Obviously, the benefactor is the government, which retains the sale proceeds. It seeks to retain its self-bestowed largesse. The government avowed concern for innocent third parties rings rather hollow.

Assuming arguendo that present property holders might somehow be "subjected to injustice and hardship" if Rowland Allen were to have his case deliberated on its merits, this does not eliminate the prospects that other remedies could be fashioned. The Federal Courts have devised remedies of far more pervasive impact than in the case sub judice. Witness, for

instance, the forms of relief afforded inmates of penal institutions which do not meet minimal constitutional criteria; further witness the myriad forms of relief and remedy afforded victims of racial and sexual discrimination.

A modest proposal for a possible remedy (if indeed, third parties might be found, upon remand, to be subjected to injustice and hardship), would be for the government to relinquish its pecuniary windfall from its sales of the properties. Fair market value of the confiscated property could be returned to Petitioners; actual sales prices of properties, with the prevailing interest rate on federal judgments from time of sale could be returned to Petitioners. The forms of possible remedies simply do not tax the ingenuity of the Federal Judiciary in the instant case.

Conclusion

Petitioners have provided this Court a groundswell of procedural infirmities underscoring the Government's arbitrary seizure and forfeiture of the Petitioner properties. These failings do not represent procedural "amenities" or "technicalities," but go to the essence of caprice and authoritarian governmental action.

Petitioner Allen was stripped of a lifetime of earnings and property, all without notice of the means by which he could protect his property in contravention of the very rules brandished by the government.

Despite the overwhelming evidence of failure to afford Petitioners the notice to which they are entitled under the rules, case law, and the Constitution, the Government (by order and by advocate's stance) dispassionately advocates the antiseptic application of res adjudicata.

Petitioners implore this matter to be exhumed, so that they may have a resolution of this mattter on the merits.

COUNSEL OF RECORD:

HYLTON B. DUPREE, JR.

MARK A. JOHNSON

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:87-CV-2258-RHH

ROWLAND LAMAR ALLEN, et al.
Plaintiffs,

v.

UNITED STATES OF AMERICA
Defendant.

FILED
AUG 17 1988

ORDER

This matter is currently before the court on defendant's motion to dismiss the complaint. In their complaint plaintiffs seek, pursuant to Rule 60(b), Fed. R. Civ. P., to have this court vacate several judgments of default entered by this court in forfeiture actions brought against the plaintiff properties in 1984. By order dated May 23, 1988, this court initially considered and partially granted the defendant's motion to dismiss plaintiffs' complaint. The court deferred ruling on the remainder of defendant's motion to dismiss and directed the defendant to file a reply brief responding to arguments raised by the plaintiffs in their response to the motion to dismiss.

On June 7, 1988, defendant filed a reply brief in accordance with this court's directive. Although the court had not directed plaintiffs to file any supplemental brief, the plaintiffs also filed a brief on June 7, 1988 addressing certain issues raised by the court's May 28, 1988 order. After receiving the

defendant's reply brief, plaintiffs filed a motion for leave to file another supplemental brief to respond to defendant's reply. A second supplemental brief, however, is unwarranted. In their response to defendant's motion to dismiss, plaintiffs raised two issues which defendant had not addressed in its motion to dismiss.[1] The court therefore deferred ruling on the majority of defendant's motion to dismiss pending the filing of a reply brief by defendant. Although plaintiffs appear to argue that defendant has raised new issues or allegations, their argument is without merit. Defendant's brief merely addresses issues raised by *plaintiffs* in their brief in response to defendant's motion to dismiss. Plaintiffs had the opportunity to and indeed did raise the dispositive issues before this court in their response brief. Thus, the court DENIES their motion to file a second supplemental brief.

In opposing defendant's motion to dismiss the complaint, plaintiffs argued that the forfeiture judgments were void ab initio and that the Eleventh Circuit opinion in *United States v. $38,000.00 in U.S. Currency*, 816 F. 1538 (11th Cir. 1987) warrants the setting aside of the forfeiture judgments. In its reply brief, defendant contends that the forfeiture judgments should be given res judicata effect and that the holding in *$38,000.00* does not warrant vacating the judgments. The court agrees with defendant and therefore GRANTS its motion to dismiss the complaint.

As this court noted in its May 23, 1988 order, the basis for plaintiffs complaint seeking to vacate the forfeiture judg-

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[1]Plaintiffs argued in their response to defendant's motion to dismiss that the forfeiture judgments entered against the plaintiff properties are void and should be vacated in light of a subsequently decided case, United States v. $38,000.00 in U.S. Currency, 816 F. 2d 1538 (11th Cir. 1987). This court directed the defendant to file a reply brief to address the issues of whether the default judgments should be vacated because void and the propriety of retroactively applying the reasoning of the court in *$38,000.00*.

ments is that this court, in entering the judgments, acted in a manner inconsistent with due process of law. To support their argument that the forfeiture judgments were entered in violation of due process of law, the plaintiffs referred to the *$38,000.00* decision in which the Eleventh Circuit held that forfeiture proceedings similar to those of the underlying case did not comply with 21 U.S.C. § 881 or Supplemental Rule C(3). Plaintiffs argued that because the forfeiture proceeding, like those in *$38,000.00*, did not conform to the law or certain procedural rules, the forfeiture judgments are void and the doctrine of res judicata does not apply to the instant action.

As a preliminary matter, the court notes that "[i]n the interest of finality, the concept of void judgments is narrowly construed." *Rubin v. Johns*, 109 F.R.D. 174, 178 (D.V.I. 1986). Generally, a final judgment will not be set aside and the doctrine of res judicata bars the litigation of claims that either were or could have been litigated in the original action. Indeed, in civil actions, unlike criminal cases, a judgment "cannot be collaterally attacked on the basis of subsequent judicial pronouncements." *Hardison v. Alexander*, 655 F. 2d 1281, 1288 (D.C. Cir. 1981). The Eleventh Circuit has noted that in this circuit, "changes in the law after a final judgment do not prevent the application of res judicata and collateral estoppel, even though the grounds on which the decision was based are subsequently overruled." *Precision Air Parts, Inc. v. Avco Corp.*, 736 F. 2d 1499, 1503 (11th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985). Generally, a retroactive judicial decision may be raised only by litigants with suits pending or not yet brought and may not be raised by unsuccessful civil litigants to overturn a final judgment. *Hardison, supra*, 655 F. 2d at 1288.

On very rare occasions, a subsequent judicial pronouncement might warrant a court overriding the res judicata bar. Res judicata may not be applied against a party who did not have a full and fair opportunity to litigate an issue in a previous suit. *Precision Air Parts, supra*, 736 F. 2d at 1504. And an interven-

ing change in the law may nullify the res judicata effect of a judgment in the rare event that the subsequent judicial decision involves "momentos [sic] changes in important, fundamental constitutional rights" such as those involving school desegregation and re-apportionment plans. *Id.*

In an action similar to the instant one, where an unsuccessful litigant contended that state court judgments were erroneously entered in violation of due process of law, the Tenth Circuit Court of Appeals applied the res judicata bar and refused to retroactively apply a subsequently decided Supreme Court decision to void the judgment. *Douglas-Guardian Warehouse Corp. v. Posey*, 486 F. 2d 739 (10th Cir. 1973). The court in *Douglas-Guardian* found that the party challenging the validity of the judgment had the opportunity but failed to raise the constitutionality argument in the earlier proceedings and that retroactive application of the later-decided Supreme Court decision would "work an injustice and a hardship" on the other parties who acquired vested rights in the judgments. *Id.* at 742-743.

In the instant action, as in *Douglas-Guardian*, the plaintiffs had ample opportunity to raise the issue of lack of procedural due process in the forfeiture proceedings. Plaintiffs' allegations that they did not receive proper notice, that the arrest warrant did not accompany the complaint and that they were not notified that they had ten days from execution of process to file a claim could have been raised either before this court or on appeal. In this court the plaintiffs filed: answers to the forfeiture complaints, a brief in opposition to the government's motion to strike their answers, a motion to amend their answers, and a motion for reconsideration of this court's order striking the answers. In each instance the plaintiffs could have raised their procedural due process arguments. In addition, the plaintiffs appealed this court's entry of default judgments against the plaintiff properties and, at that time, had every opportunity to litigate their constitutional claims.

Plaintiffs were not deprived, either by this court or the Court of Appeals, of a full and fair opportunity to litigate the procedural due process issue it now presents. The *$38,000.00* decision which plaintiffs seek to have this court apply retroactively to void the judgment, did not involve "momentous changes in important, fundamental constitutional rights." The Eleventh Circuit in *$38,000.00* merely applied and strictly construed the language of 18 U.S.C. § 221 and the Supplemental Rules for Certain Admiralty and Maritime Claims. The Eleventh Circuit decision does not constitute the kind of intervening change in the law which nullifies the res judicata effect of the prior forfeiture judgments. Finally, since November 1985, when the Eleventh Circuit affirmed this court's entry of default judgments in the forfeiture actions, the government has sold most, if not all, of the plaintiff property. If this court were to vacate the forfeiture judgments at this juncture, the innocent third-party purchasers would be subjected to injustice and hardship. For all these reasons, the court GRANTS defendant's motion in full and hereby DISMISSES plaintiffs' complaint and TERMINATES this action.

So ORDERED this 17 day of August, 1988.

ROBERT H. HALL
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

APPENDIX B

In the United States Court of Appeals for the Eleventh Circuit

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No. 88-8801

ROWLAND LAMAR ALLEN,
Plaintiff-Appellant,

MID-TOWN CONTRACTORS, INC., et al.,
Plaintiff,

v.

UNITED STATES OF AMERICA
Defendant-Appellee

APPEAL *from the* United States District Court for the Northern District of Georgia
(June 26, 1989)

Before CLARK and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

JUDGMENT ENTERED FOR THE COURT
DATED JUN 26 1989 Miguel J. Cortez, Clerk

David Maland
David Maland, Deputy Clerk

ISSUED AS A MANDATE
September 7, 1989
Costs: Against; Plaintiff-Appellant

APPENDIX C

In the United States Court of Appeals for the Eleventh Circuit

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No. 88-8801

ROWLAND LAMAR ALLEN,
Plaintiff-Appellant,

MID-TOWN CONTRACTORS, INC., et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

APPEAL *from the* United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion June 26, 11 Cir., 1989, ____F.2d____).

Before CLARK and EDMONDSON, *Circuit Judges*, and TUTTLE, *Senior Circuit Judge*.

PER CURIAM

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehear-

ing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:
Thomas A. Clark
Thomas A. Clark. United States Circuit Judge